SIVANES RAJARATNAM

v.

USHA RANI SUBRAMANIAM

COURT OF APPEAL, KUALA LUMPUR
ABDUL HAMID MOHAMAD JCA
KC VOHRAH JCA
ALAUDDIN MOHD SHERIFF JCA
[CIVIL APPEAL NO: W-02-357-1997]
13 JUNE 2002

FAMILY LAW: *Matrimonial property - Division of property - Past income no longer available at time of divorce - Rental shortfall - Occupation rent - Whether must be 'accounted' for and divided - Whether only assets available at time of divorce to be divided - Law Reform (Marriage and Divorce) Act 1976, s. 76 - Suitability of reliance on English cases*

This was an appeal by the respondent/husband against the orders of the High Court in respect of the division of matrimonial property made pursuant to his divorce from the petitioner/wife. In challenging the said orders, the husband contended that the High Court had misconstrued s. 76 of the Law Reform (Marriage and Divorce) Act 1976 ('the Act'), which section, it was argued, envisages only the division of assets acquired during the marriage and available at the time of the divorce, and **not** the division of past income which is no longer available for distribution at the time of the divorce.

Held:
Per Abdul Hamid Mohamad JCA

[1] There are **no** authorities to support the proposition that s. 76 of the Act exhorts an 'accounting' of all the past income and assets acquired during a marriage and then awarding the 'shortfall' to the former spouse who benefited less from such income or assets. The matrimonial assets to be divided under s. 76 of the Act must necessarily be assets existing at the time of the divorce. (pp 305 i & 306 a)

[2] The nature and extent of each former spouse's contribution and the question of whether one has enjoyed the property to the exclusion of the other (and the reasons therefor) are only relevant for determining the portion that each former spouse should receive upon the division of the matrimonial assets. They are **not** for the purpose of calculating a share of the past income to be given to a former spouse. (p 306 b)

[3] In a marriage, both spouses share everything and contribute to the family and home in one way or another and at varying degrees. Where both spouses work and receive income, each inevitably spends his or her own earnings on the family. Similarly, where there is income from an asset acquired during the subsistence of a marriage, eg rent, even though it may be paid into the account of one spouse, it will eventually go towards the family, either partially or entirely. No one keeps an account – indeed no one should – as a marriage is not a business venture. Thus when a marriage breaks up, it is unreasonable that the court should undertake an 'accounting' of the income and expenditure of the parties during the subsistence of the marriage. The function of the court is to make a fair and equitable division of the matrimonial assets that exist at the time of the divorce, taking into consideration the factors laid down in s. 76 of the Act. It must be remembered that the court is dividing matrimonial assets and **not** assessing damages. (pp 306 d-f & 309 g)

[4] In dividing matrimonial assets pursuant to a divorce, the courts in Malaysia should pay special attention to the provisions of the Act and not rely uncritically on decided cases from other jurisdictions, except perhaps those from Singapore where the relevant law is similar. It is **not** advisable to rely ingenuously on English cases. (p 306 g)

[Appeal allowed in part.]

*[**Bahasa Malaysia** Translation Of Headnotes]*

Ini adalah rayuan oleh responden/suami terhadap perintah-perintah Mahkamah Tinggi berhubung dengan pembahagian harta suami isteri yang dibuat selaras dengan perceraian beliau daripada pempetisyen/isteri. Dalam mencabar perintah-perintah tersebut, suami menegaskan bahawa Mahkamah Tinggi telah tersalah-tafsir s. 76 Akta Membaharui Undang-undang (Perkahwinan dan Perceraian) 1976 ('Akta tersebut'), seksyen yang mana, telah dihujahkan, membayangkan hanya pembahagian aset-aset yang diperolehi ketika perkahwinan dan ada pada waktu perceraian, dan bukan pembahagian pendapatan yang lalu yang mana tidak lagi ada untuk pembahagian pada waktu perceraian.

Diputuskan:
Oleh Abdul Hamid Mohamad HMR

[1] Tidak terdapat otoriti-otoriti untuk menyokong proposisi bahawa s. 76 Akta tersebut mendesak suatu 'perakaunan' akan kesemua pendapatan yang lalu serta aset-aset yang telah diperolehi ketika perkahwinan dan kemudiannya mengawardkan "kekurangannya" kepada bekas suami/isteri yang mendapat manfaat yang kurang daripada pendapatan atau aset-aset yang sedemikian. Aset-aset suami isteri yang akan dibahagikan di bawah s. 76 Akta tersebut semestinya merupakan aset-aset yang wujud pada waktu perceraian.

[2] Sifat dan had sumbangan setiap satu bekas suami atau isteri dan persoalan sama ada salah satu dari mereka telah mendapat nikmat dari harta tersebut dengan mengecualikan pihak yang satu lagi (dan alasan baginya) adalah hanya relevan untuk menentukan bahagian yang setiap satu bekas suami atau isteri seharusnya menerima setelah pembahagian aset-aset suami isteri. Ianya bukan untuk tujuan mengira sebahagian dari pendapatan yang lalu untuk diberikan kepada bekas suami atau isteri.

[3] Dalam sesuatu perkahwinan, kedua-dua suami dan isteri berkongsi segalanya dan menyumbangkan kepada keluarga dan rumah dengan satu cara atau pun yang lain dan pada had yang berlainan. Di mana kedua-dua suami dan isteri bekerja dan menerima pendapatan, setiap seorang dari mereka semestinya akan membelanjakan pendapatan mereka sendiri ke atas keluarga. Begitu juga, di mana terdapatnya pendapatan daripada sesuatu aset yang telah diperolehi ketika penerusan perkahwinan, contohnya sewa, meskipun ianya mungkin dibayar ke dalam akaun salah seorang suami atau isteri, ianya akan akhirnya dibelanjakan bagi keluarga sama ada keseluruhannya atau sebahagian daripadanya. Tiada siapa yang menyimpan akaun – sesungguhnya tidak seorang pun yang harus melakukannya – kerana sesuatu perkahwinan bukannya merupakan suatu usaha perniagaan. Oleh itu apabila sesuatu perkahwinan berakhir, ianya adalah tidak wajar bagi mahkamah menjalankan satu "perakaunan" pendapatan dan perbelanjaan pihak-pihak tersebut ketika penerusan perkahwinan tersebut. Fungsi mahkamah adalah untuk membuat satu pembahagian yang saksama dan adil dari aset-aset perkahwinan yang wujud pada waktu perceraian tersebut, dengan mengambilkira faktor-faktor yang dibentangkan dalam s. 76 Akta tersebut. Adalah harus diingat bahawa mahkamah membahagikan aset-aset suami isteri dan bukannya menaksirkan gantirugi.

[4] Dalam membahagikan aset-aset suami isteri selaras dengan suatu perceraian, mahkamah-mahkamah di Malaysia seharusnya memberikan perhatian khas kepada peruntukan-peruntukan Akta tersebut dan tidak bergantung secara tidak kritikal kepada kes-kes yang telah diputuskan daripada bidangkuasa-bidangkuasa lain, kecuali kes-kes daripada Singapura di mana undang-undang yang relevan adalah sama. Adalah tidak dinasihatkan untuk bergantung secara buta kepada kes-kes Inggeris.

[Rayuan dibenarkan sebahagiannya.]

Case(s) referred to:
Ching Seng Woah v. Lim Shook Lin [1997] 1 CLJ 375 ***(foll)***
Dennis v. Mc Donald [1981] 2 All ER 632 ***(dist)***
Loo Cheng Suan Sabrina v. Khoo Oon Jin Eugene [1995] 1 MLJ 115 ***(refd)***

Legislation referred to:
Law Reform (Marriage and Divorce) Act 1976, s. 76

For the appellant - Balwant Singh Sidhu; M/s Balwant Singh Sidhu & Co
For the respondent - Jadadish Chandra; M/s Arbain & Co

Reported by Gan Peng Chiang

JUDGMENT

Abdul Hamid Mohamad JCA:
In this judgment the respondent (husband) in the High Court proceeding will be referred to as "the appellant" and the petitioner (wife) in the High Court will be referred to as "the respondent". They are both medical doctors. They were married on 1 May 1983. They were separated on 27 October 1990. A *decree nisi* was issued on 17 September 1993 and was made absolute on 9 May 1994.

This appeal is against the order of the court regarding the division of their matrimonial assets.

At the time of the marriage both parties were employed as medical doctors at the Mentakab District Hospital. After two years of marriage the appellant resigned from government service and joined a group practice in Shah Alam. They set up their matrimonial home in Shah Alam, at a rented house. During that period the respondent (wife) travelled from Mentakab to Shah Alam during weekends. Shortly thereafter she joined the Keretapi Tanah Melayu (KTM). She was given quarters at Kenny Hills. However, they continued to live at the rented house in Shah Alam. The KTM house was occupied by the respondent's parents for about nine months. In December 1986 the parties used the KTM house as the matrimonial home until their separation in October 1990.

On 21 August 1987 the appellant opened a clinic at No. 43, Jalan Silang, Kuala Lumpur under the name of "Klinik Inter-Med". However, the respondent remained in the KTM service, in view of the stable income and the benefits of housing and its free maintenance. In early 1990 the appellant purchased a property, the Crescent Court Apartment for RM117,000.

The terms of the order made by the learned Judicial Commissioner (as he then was) on 12 May 1997 are as follows:

(1) That the apartment be valued by a qualified valuer to be agreed by the parties and after deduction of the redemption sum of RM90,000 the respondent is awarded one half of the value in cash.

(2) That the appellant do pay the respondent RM20,100 together with interest at 4% per annum from October 1992 to 12 May 1997, being one half of the rental shortfall.

(3) That the appellant pay the respondent RM43,000 being rental due to the respondent from 1 October 1993 until to date and still continuing until such time as the said property is valued and the respondent given her half share.

(4) That the appellant do pay the respondent RM1,133 from the Maybank Savings Account.

(5) That, within seven days of the date of the order, the appellant nominate the sole daughter of the marriage, Shaleen d/o Sivanes, as sole beneficiary of the two Great Eastern Life Assurance insurance policies.

(6) That the appellant pay the respondent RM200,000 being the respondent's entitlement to one-third of the income from Klinik Inter-Med.

Before us, learned counsel for the appellant challenged items (1), (2), (3) and (6).

However, before dealing with each of the items challenged, there is one general argument that has to be considered first. Learned counsel for the appellant argued that the approach of the learned Judicial Commissioner (as he then was) was wrong. The learned Judicial Commissioner (as he then was), especially in awarding the rental shortfall (item (2)), occupation rent (item (3)) and one third share of the income of Klinik Inter-Med (item (6)) had contravened the provisions of s. 76 of the Law Reform (Marriage and Divorce) Act 1976. He argued that that section envisaged the division of assets acquired during the marriage and available at the time of the divorce, not the division of past income which was no longer available for distribution at the time of the divorce. He submitted that it was wrong for the court to "do an accounting between the parties" as in the case of, say, two partners in a partnership business in a civil suit. The division of matrimonial assets in a divorce petition is governed by s. 76 of the Act, he submitted.

I find this a very interesting argument. Section 76 of the Act provides:

76. Power for court to order division of matrimonial assets.

(1) The court shall have power, when granting a decree of divorce or judicial separation, to order the division between the parties of any assets acquired by them during the marriage by their joint efforts or the sale of any such assets and the division between the parties of the proceeds of sale.

(2) In exercising the power conferred by subsection (1) the court shall have regard to:

(a) the extent of the contributions made by each party in money, property or work towards the acquiring of the assets;

(b) any debts owing by either party which were contracted for their joint benefit;

(c) the needs of the minor children, if any, of the marriage,

and subject to those considerations, the court shall incline towards equality of division.

(3) The court shall have power, when granting a decree of divorce or judicial separation, to order the division between the parties of any assets acquired during the marriage by the sole effort of one party to the marriage or the sale of any such assets and the division between the parties of the proceeds of sale.

(4) In exercising the power conferred by subsection (3) the court shall have regard to –

(a) the extent of the contributions made by the other party who did not acquire the assets to the welfare of the family by looking after the home or caring for the family;

(b) the needs of the minor children, if any, of the marriage;

and subject to those considerations, the court may divide the assets or the proceeds of sale in such proportions as the court thinks reasonable; but in any case the party by whose effort the assets were acquired shall receive a greater proportion.

(5) For the purposes of this section, references to assets acquired during a marriage include assets owned before the marriage by one party which have been substantially improved during the marriage by the other party or by joint efforts.

From the authorities referred to us by both learned counsel and from my research, as far as I can ascertain, I am unable to find any decided case in Malaysia and Singapore to support an accounting of all the assets acquired or improved during the marriage and the income thereof and the determination

of who had benefitted more or less and awarding a shortfall to the party who is found to have benefitted less. All the cases simply talk about the "division" of the matrimonial assets, which necessarily means the existing assets at the time of the divorce. Of course the question of the size and nature of each spouse's contribution and who has enjoyed the property to the exclusion of the other (for example, as in this case, where only one party lived at the Crescent Court Apartment) and the reasons why, are relevant in determining the portion that each spouse should get, but not, in my view, for the purpose of calculating either spouse's share of past income.

This view, in my opinion, is consistent with the wording and spirit of s. 76. That section talks of "division" of assets acquired during the marriage and provides the factors that should be taken into account when making the division.

Besides (I am speaking generally here) in a marriage, both spouses share everything, both contribute towards the home and family in one way or another, to a bigger or smaller extent. Where both spouses work and earn income, each of them inevitably spends his or her own income for the family. Similarly, where there is income from an asset purchased during the subsistence of the marriage, say rent, even though it may be paid into the account of one spouse, eventually it will go to the family, may be all and may be part of it. No one keeps an account, indeed no one should, as a marriage is not a business venture.

So, if and when the marriage breaks up, it is unreasonable that the court should undertake an accounting of their income and expenditure during the period the marriage subsists. The function of the court is to make a fair and equitable division of the matrimonial assets that exist at the time of the divorce, taking into account the factors provided by s. 76.

Further, in making the division, Malaysian courts should pay special attention to the provision of the Act and not rely uncritically on decided cases from other jurisdictions, except, perhaps, Singapore where the relevant law is similar. To rely uncritically on English cases, in my view, is not advisable. The case of *Dennis v. Mc Donald* [1981] 2 All ER 632 for example, is a case concerning an unmarried couple with children born out of wedlock. Yet the court in England referred to the relationship as a "matrimonial relationship". Our own High Court too has referred to it in *Loo Cheng Suan Sabrina v. Khoo Oon Jin Eugene* [1995] 1 MLJ 115 and also in this case.

I would like to re-emphasise what this court has said through Mahadev Shankar JCA in *Ching Seng Woah v. Lim Shook Lin* [1997] 1 CLJ 375 at pp. 390-391:

> Two points should now be made. The first is that whilst s. 47 refers to English principles we should always keep in the forefront of our minds that when the Act was first initiated we were breaking new ground. It was then necessary to look to English case law because we had adopted much of the wording of the corresponding English statute. In the two decades which have since passed, we have injected enough local experience into the application of the provisions of Pt VI of the Act to become acutely aware that the differences between social and cultural aspirations with regard to marriage, divorce and welfare in England and Malaysia are such that much caution is called for before we adopt modern English attitudes. The measures we should take today to preserve the integrity of the Malaysian family when it is threatened by the calamity of divorce must be determined in the light of the Malaysian conditions. At best therefore the English reports should only be regarded as being of persuasive value or as case studies on why the family as a unit is progressively disintegrating in that country where one-parent households and unmarried mothers now number at least three out of ten.

I am of the view that the courts in this country should not treat such a relationship as in *Dennis v. Mc Donald* [1981] 2 All ER 632 as a "matrimonial relationship." There must be a valid marriage under Malaysian law applicable to a couple before there can be any matrimonial relationship. In this country, a person is either married or not married. There is nothing in between. A marriage is either monogamous or polygamous. There is nothing in between. A Muslim marriage is polygamous. A non-Muslim marriage contracted after the coming into force of the Law Reform (Marriage and Divorce) Act 1976 is monogamous. It cannot be both monogamous and polygamous. The line dividing the two is clear.

I shall now deal with the specific issues in this case.

The Crescent Court Apartment

The apartment was purchased in January 1990 in the appellant's name for RM117,000. At the time of the proceeding in the High Court it was worth about RM210,000. The appellant paid RM24,000. This amount came from their joint account. He also withdrew RM12,700 from his Employees Provident Fund (EPF) for the purpose. As found by the learned trial judge the appellant obtained a loan of RM93,000. A sum of RM25,000 to RM30,00000 was spent on renovations. The apartment was rented out at RM1,600 per month for one year and at RM2,300 up to September 1993. The total amount of rent was RM85,900 which should have been credited to the Citibank account. However, only RM45,700 was credited, leaving a "shortfall" of RM40,200. The apartment was untenanted for three months, that is, from September to November 1993. From December 1993 to April 1997 the appellant was living in the apartment, a period of 41 months. The learned trial judge also found that the final redemption sum (outstanding loan) was RM90,000.

The learned Judicial Commissioner (as he then was) found that the apartment was bought as an investment and it was bringing rental which was being paid towards the loan. The apartment was not a matrimonial home. The respondent never lived in the apartment nor did she leave it voluntarily or otherwise. The learned Judicial Commissioner (as he then was) then went on to say:

> The principles of equity referred to in *Dennis v. Mc Donald* must apply and it is inequitable for the respondent (appellant) to live rent free in the apartment bought solely for investment purposes. It is unacceptable for the respondent (appellant) to suggest that the petitioner ought to have herself stayed in the apartment when she already had a home to stay in and when she knew that the apartment was bought as an investment.

The learned Judicial Commissioner (as he then was) then ordered that the apartment be valued by a qualified valuer to be agreed to by both parties and the sum of RM90,000 (the redemption sum) to be deducted from the said valuation and the respondent be entitled to half the balance in cash.

First, I have no reason to interfere with the finding of facts by the learned Judicial Commissioner (as he then was) as narrated above.

Secondly, in spite of what I have said earlier, on the facts of this case where the parties were lawfully married, I have no objection to the principle in *Dennis v. Mc Donald* [1981] 2 All ER 632 being applied in this case provided it is understood that, I am in no way recognising a "live in" relationship as a "matrimonial relationship" with rights and obligations provided by law to a married couple, no matter how many children they may have together. In other words, the principle in *Dennis v. Mc Donald* should not, in this country, be applied to unmarried couples. If a couple chooses not to get married as provided by our law, they should not be talking about a "matrimonial relationship", "matrimonial home", "conjugal rights", "matrimonial proceedings" or "division of matrimonial assets". Those terms are exclusively for lawfully married couples in accordance with our laws.

Thirdly, I take into account the fact that only the appellant had lived in the apartment (a matrimonial asset, not a matrimonial home) as a factor in considering the portion that the respondent (wife) is entitled to, not for the purpose of doing an account of past rents and ordering a "shortfall" to be made good.

It cannot be denied that the respondent is entitled to a share of the Crescent Court apartment. The question is how much. In determining how much we are governed by the provisions of s. 76 of the Act. That is the primary law. And, like any law, it can only be worded in general terms. It is for the court to determine, guided by the principles laid down in the section and based on the facts of each case, how much is the fair and reasonable portion each party

is entitled to. Of course the court should also take into account the decided cases, especially of the more superior courts of this country and, in this case also of Singapore, the relevant written law of which is similar to ours.

In this case, as far as direct financial contribution of the respondent is concerned, her contribution came from the "joint account" of RM24,000 used to pay the down payment. Even if her share is taken to be half, it is only RM12,000 of the total purchase price of RM117,000 which is about 10%. But I agree that that is not the only factor that should be taken into account.

What were her other contributions towards the purchase and improvement of the asset? First, the renovation, the total cost of which is between RM25,000 to RM30,000. Where did the money come from? There is no evidence that she contributed any part of it. Her only "contribution" is that she "did the major supervisions".

Secondly, the fact that the apartment was rented out. Of the total rental earned RM45,000 was credited to the Citibank account and used for the settlement of the loan. RM40,000 was not credited. The learned Judicial Commissioner (as he then was), at first, at p. 18 of his grounds of judgment, said:

> To my mind this shortfall should be disregarded because although the rentals were to be paid towards the loan and yet not paid, however in any case, the respondent had been settling the loan. In the circumstances I made no award with regard to this claim for rentals by the petitioner.

However, on the following day the learned Judicial Commissioner (as he then was) vacated the order. His subsequent order appears at p. 19 of his grounds of judgment. In this new order he made a separate award in respect thereof. He divided the "shortfall" of RM40,200 into two and granted the respondent half the amount, which is RM20,100 as a separate award. His reasons are first, the respondent "ought to have credited the "shortfall" but did not "and secondly, because "credit for the redemption sum has already been given."

I agree that the "shortfall" should be taken into account, but for the purpose of determining the portion of the contribution, not as in a claim for damages in civil suits. The court is dividing a "matrimonial asset" not assessing damages.

It should also be noted that even though that "shortfall" was not credited to the account and used for the payment of the loan installments, clearly the installments were being paid, otherwise the bank would have instituted proceedings in respect of it. Payment for assessment, quit rent and may be repairs will have to be made. The family too, in some way, may have benefitted from the "shortfall". Of course we do not know much. But the court is not required to do an accounting.

Next comes the "occupation rent". The appellant alone lived in the apartment from 1 October 1993 until 1 June 1997, a period of 44 months. The learned Judicial Commissioner (as he then was) ordered that half the "rental" per month be paid to the respondent. The final figure found by the learned Judicial Commissioner (as he then was) is RM43,100 and the order continues until such time as the property is valued and the petitioner given her half share.

The question is whether it should be taken into account in determining the portion to be awarded to the respondent or to be awarded as a separate item as the learned Judicial Commissioner (as he then was) had done.

I must admit that I have some difficulty in answering this question. On the one hand, I must bear in mind that the function of the court is to divide the matrimonial assets, not to do an accounting of the income of the spouses during the marriage. A person who buys property should be able to enjoy it and not to be treated as a simple tenant in his own house. It is true that the appellant did not have to move into the apartment if he did not want to but clearly, he moved out of the matrimonial home because the marriage was already breaking down. And, if he had not moved into the apartment, it could have been rented out. But the respondent too was not prevented from moving into the apartment had she wanted to. If she did not, most probably, it was for the same reason why the appellant moved out of the matrimonial home: the marriage was breaking down.

On the other hand, there is the period after the marriage was dissolved until the apartment is valued and the respondent's entitlement is fully paid to her, during which period the appellant alone stays at the apartment to the exclusion of the respondent.

It does not seem fair to me that that period should not be accounted for and the respondent should not be compensated for.

In the circumstances, without breaching the function of the court of dividing the matrimonial assets, a fair thing to do is to take into account the period prior to the dissolution of the marriage during which period the appellant stayed at the apartment as a factor in determining the portion that the respondent is entitled to. But, for the period after the dissolution of the marriage until the respondent's share is paid in full, a portion of the rental otherwise would be earned should be paid as a separate item to the respondent.

In the circumstances, in my view, taking all the factors into account, including the direct financial contribution by the respondent towards the purchase of the house (which was about 10%), the fact that the appellant must have utilised part of the rental shortfall exclusively for his own benefit, and the fact that he alone had lived at the apartment prior to the dissolution of the marriage, a

reasonable division would be that the respondent is entitled to half the current value of the apartment. As the current value of the apartment is definitely more than the purchase price, both parties stand to gain from their investment.

In other words, I would confirm the order of the learned Judicial Commissioner (as he then was) that the apartment be valued by a qualified valuer to be agreed by both parties and after deducting a sum of RM90,000 (the redemption sum), the balance is to be divided equally and half of it be paid in cash to the respondent. However, in coming to our conclusion, I would differ from the learned Judicial Commissioner (as he then was) in that I take into account two factors ("rental shortfall" and "occupation rent") on which the learned Judicial Commissioner (as he then was) made separate awards.

Rental Shortfall

I do not think that it is necessary to repeat my discussion of this issue. For the reasons that I have given I do not think it is correct that it should be given as a separate award.

Occupation Rental Prior And Subsequent To The Dissolution Of The Marriage

Similarly, for the reasons that I have given above, I do not think that there should be a separate award for occupation rental prior to the dissolution of marriage. However, half the occupation rental from the date of the dissolution of the marriage until the respondent's half share of the value of the apartment is paid in full to her, must be paid to the respondent.

Klinik Inter-Med

The facts of the case were dealt with by the learned Judicial Commissioner (as he then was) under two headings, first under the heading "the facts" and subsequently under the heading "court's findings". The facts, as found by the learned Judicial Commissioner (as he then was) under "court's findings" are quite brief compared to the facts narrated under the heading "The Facts". They lack the details enumerated under the heading "the facts". I do not know what the findings of the learned Judicial Commissioner (as he then was) regarding them were. However, I must add that the facts as found by the learned Judicial Commissioner (as he then was) and narrated under the heading "court's findings" are quite sufficient to show the extent of the respondent's contribution towards the establishment and the running of the clinic. I accept his findings of facts which is now reproduced for easy reference:

> The clinic was opened during the subsistence of the marriage. The petitioner had testified that she had contributed towards the opening of the clinic. She had arranged for the banking facilities and even stood as a guarantor. When they were in need, even the family car, the Mazda, was sold to tide over the difficult period. The respondent admitted that about RM10,000 of their savings

had been utilised in the opening of the clinic. Furthermore there was clear evidence that during the initial years the respondent stopped contributing towards the household expenses. The respondent had no rental payments to worry about as the house provided to the petitioner by KTM resolved that issue. All the while the petitioner was working and continued working even when the clinic was doing well. In other words the petitioner contributed financially and physically in the setting up of the clinic, thereby enabling the respondent to devote his energy to the running of the clinic.

But, what the learned Judicial Commissioner (as he then was) did was to do an accounting of the net income supposedly earned by the clinic and awarded one-third of it to the respondent, at a rounded figure of RM200,000.

Here again I am faced with the question of the approach that the court should take: to do an accounting of past income or divide the existing asset. I prefer the second approach, in view of the provisions of s. 76 of the Act. I see the difficulty that the learned Judicial Commissioner (as he then was) was facing in trying to determine the income supposedly earned by the clinic. The income declared to the Department of Inland Revenue, and relied on by the appellant is one thing. The income the respondent claimed that the appellant had earned is another. The income, the expenses and the net income the appellant is supposed to have earned per year is actually no more than an arbitrary figure. Then there is the question of income tax that has not been paid on the net income found by the court which is more than the income declared to the Department of Inland Revenue. The respondent says that as the appellant had not paid that tax (again an arbitrary figure), she is entitled to it. On the other hand, the appellant says that since that is the tax that he **should** pay, he is entitled to it. The point is, if that amount, as found by a court is tax, then neither of them is entitled to it. It is the Government of Malaysia that is entitled to it.

Furthermore, I do not think that it can be denied that income earned from the clinic since its opening had somehow been spent and enjoyed by the family, even though no one knows and I do not think it can be expected to be proved by either party, how much or in what proportion.

In the circumstances, I am of the view that the correct approach is to **divide** the asset, not to apportion past income which is no more than an arbitrary figure arrived at based, as in this case, on mere assertions of interested parties.

So, the clinic, including all its equiptments and goodwill should be valued by a qualified valuer to be agreed by both parties and one-third of the value be paid in cash to the respondent. As it will take time to finalise and for payment to be made, a fair solution is to order the respondent to pay interest at 4%

(taking into account the current rate of interest on fixed deposits) on the amount of the one-third share the respondent is entitled to. The interest should run from the date of the judgment of the High Court until the full amount is paid.

In the circumstances, I would allow the appeal and make the following orders:

(a) The Crescent Court Apartment – The order of the learned Judicial Commissioner (as he then was) is confirmed in that the apartment be valued by a qualified valuer to be agreed by both parties and after deducting the redemption sum of RM90,000, the balance is to be divided equally and half of it is to be paid in cash to the respondent.

(b) Rental shortfall – no separate award.

(c) Occupation rental prior and subsequent to the dissolution of marriage – no separate award for occupation rental prior to the dissolution of marriage. However, half the occupation rental from the date of the dissolution of marriage until the respondent's half share of the value of the apartment is paid in full to the respondent, is to be paid to the respondent.

(d) Klinik Inter-Med – the clinic, including all the equipments and goodwill to be valued by a qualified valuer to be agreed by both parties and one-third of the value be paid in cash to the respondent. Interest of 4% on the amount of the one-third share of the respondent to be paid to the respondent from the date of the judgment of the High Court until the full amount is paid.

(e) Liberty to apply for consequential orders for the carrying of these orders which may be made to the same High Court, even though not before the same judge.

(f) Each party to pay his/her own costs. Deposit to be refunded.

My learned brothers KC Vohrah and Alauddin Mohd. Sheriff JJCA have read this judgment in draft and have expressed their agreement with it.